Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1109

SHEARN MOODY, JR.,
Petitioner,

VS.

STATE OF ALABAMA, EX REL. CHARLES H. PAYNE,
Commissioner of Insurance and Receiver of Empire
Life Insurance Co., of America
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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RELATED LITIGATION

The opinion of the Supreme Court of Alabama is reported at Ala., 351 So. 2d 552.

Related Court decisions are:

Moody v. State, ex rel Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, ex rel Payne, Ala., 344 So. 2d 160 (1977);

Ex Parte Moody, Ala., 351 So. 2d 538 (1977);

Moody v. State, ex rel Payne, Ala., 351 So. 2d 547 (1977);

Moody v. State, ex rel Payne, 520 S.W. 2d 452 (Tex.Civ.App. - Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W. 2d 366 (Tex.Civ. App. - Austin 1973);

Moody v. Crook, 520 S.W. 2d 958 (Tex.Civ.App. Austin 1975);

Moody v. Jones, 518 S.W. 2d 536 (Tex.Civ.App. Austin 1975);

Day v. Jones, 489 S.W. 2d 368 (Tex.Civ.App. - Austin 1972, n.r.e.);*

Moody v. Moody Nat'l Bank, 522 S.W. 2d 710 (Tex.Civ.App. - Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W. 2d 158 (Tex.Civ.App. - Waco 1976 writ ref'd n.r.e. 1977).

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*Indicates denial of review by the Texas Supreme Court upon finding of "no reversible error"(n.r.e.).

Other petitions of related cases reaching this Court are:

No. 77-428 (denied December 12, 1977, rehearing denied February 21, 1978)

No. 76-1845 (denied October 3, 1977, rehearing denied November 28, 1977)

No. 77-873 (pending)

No. 77-571 (denied December 12, 1977, rehearing denied January 16, 1978)

No. 77-1041 (pending)

QUESTION PRESENTED

Under the circumstances of this case and under the Constitution of the United States and Alabama and the federal and Alabama Law, did the state trial court in Alabama have the authority to prohibit Moody from filing a complaint in a federal court?

STATEMENT OF THE CASE

1. Background of Receivership.

On June 29, 1972, Empire Life Insurance Company of America (Empire) was found to be impaired and insolvent and placed in Receivership by the Circuit Court of Jefferson County, Alabama. Empire was also placed in ancillary receivership in the States of Arkansas, Montana and Texas. The president, chairman of the board of directors and principal stockholder of Empire was Shearn Moody, Jr., (Moody).

Following an extensive hearing in which Moody was represented as a party litigant, the receivership court determined Empire to be impaired in excess of ten million dollars and insolvent in excess of six million dollars and ordered the Company liquidated and the active insurance business reinsured into Protective Life Insurance Company. This case was upheld in *Moody v. State, ex rel Payne,* Ala., 344 So. 2d 160, (1977) cert denied *Shearn Moody, Jr., v. Charles H. Payne,* etc. U.S. (Case No. 77-428).

2. Background of Injunction.

Petitioner, Moody, states that he has:

> " consistently and vigorously protested the receiverships and the dissolution of Empire, and has contended that the assets of Empire have been grossly undervalued to make it appear insolvent."

The concession by Moody is perhaps the most profound understatement contained in any application ever made to this Court.

The facts leading up to the January 6, 1975 order of the trial court enjoining Moody from filing the complaint are best stated by the Supreme Court of Alabama speaking through Mr. Justice Merrill, in *Moody v. State, ex rel Payne,* 295 Ala. 299 (pp 302-304), 329 So. 2d 73 (1976). A shorthand rendition of those facts are as follows:

On December 27, 1974, the Receiver of Empire, Commissioner of Insurance, John G. Bookout, applied for and received a temporary restraining order against Moody and others. To supplement the application, Bookout attached affidavits concerning the multiplicity of litigation instituted by Moody following the court devaluation of Empire's principal asset and the order of liquidation and reinsurance. A hearing on that application was set for January 6, 1975.

At the hearing on January 6, 1975, Commissioner Bookout testified that he had been subjected, both as Receiver of Empire and individually, to numerous law suits and proceedings filed by Moody or Moody Attorneys all of which related to the Empire receivership and were filed subsequent to the plenary hearing conducted by the receivership court in April of 1974 culminating in an order of insolvency and reinsurance on June 14, 1974. Bookout also testified in detail as to some seven separate actions then pending or filed by Moody or instituted by Moody.

Commissioner Bookout further testified as to a threat made by Shearn Moody in the following terms:

> "(Shearn Moody) said to me, in words to this effect that Mr. Bookout, we are just getting started on you. "I intend to sue you personally. My actions will be of a personal nature against you to carry over after you

have left the office (of Commissioner of Insurance).***we killed Crawford Martin and somebody else,***he died with a heart attack the day after he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us fifty years." (295 Ala. 304)

Following the hearing, the Court issued an order restraining Moody and others from filing any lawsuit, complaint, legal claim or amendment thereto which related to the receivership of Empire Life Insurance Company of America without prior approval of the receivership court. This injunction was upheld by the Supreme Court of Alabama in *Moody vs. State, ex rel Payne,* supra. See also, *Ex parte Moody,* Ala., 351 So. 2d 538 (1977). Note also Title 28A, Section 624 (2) Code of Alabama Recompiled 1958 (Section 27-32-5, Code of Alabama 1975).

3. Present Litigation.

On June 23, 1975, Moody requested permission of the Circuit Court to file an amended counter-claim in a civil action then pending in the United States District Court for the Northern District of Texas. Permission was granted July 7th, 1975. However, Moody was denied leave to amend his counter-claim by the United States District Court.

Following a delay of almost a year, Moody on May 19, 1976, requested permission of the receivership court to institute a new suit in the United States District Court in Texas based upon the same claims asserted in the proposed amended counter-claim. This request was set for hearing on July 19, 1976. Although three Attorneys appeared for Moody, none mentioned the pending request, and it was subsequently denied on August 19, 1976. (Rpp. 25-27).

Thereafter, on September 28, 1976, for the third time, Moody sought permission to file another action against the named parties. After hearing argument of Moody's counsel in support of the motion, the Circuit Court entered an order of denial on November 27, 1976. Moody presented no evidence to the Court, made neither a showing of good faith, nor a showing that the requested filing of the new complaint was not purely and solely for the purpose of further delay and interference with the res of the receivership estate.

ARGUMENT

I. DOCTRINE OF CONCURRENT JURISDICTION — THE EXCEPTION.

The validity vel non of the injuction order of January 6, 1975, is not in question in this case. Rather, it is the application of that injunction to the circumstances at bar.

To say that Moody's track record is appalling is an understatement. If ever a case deserved an injunction both *in personam* and *in rem*, this case deserves that injunction.

The Allmon case referred to in the background and other related decisions was an attempted civil rights action brought by a policyholder of Empire one Willie Allmon, at the instigation of Moody. It was this action that finally led to the injunction and to subsequent contempt orders. Moody in Allmon attempted to use the vehicle of civil rights to relitigate the entire receivership proceedings and wrest the control of the res from the receiver and the receivership court. The United States District Court for the Middle District of Alabama looked beyond the claim of civil rights to the purpose of the litigation and declined to interfere with the receivership court's control of the estate.

The leading case on the subject of concurrent jurisdiction of the state and federal judiciary is *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 452 (1938). In that case Lida having first obtained a divorce in Ireland providing for payments of alimony and child support through a trust agreement from her husband was forced to seek enforcement of the agreement through the Common Pleas Court of Fayette County, Pennsylvania. This court entered a decree sustaining the agreement and removing the former husband as a trustee, fixed a lien on his partnership interests and restrained him from certain

conveyances to protect the trust fund. The trustees acting under the court's supervision proceeded to file accounting and operate under the trust agreement.

Following this, Lida and her son brought suit in equity in the United States District Court for the Western District of Pennsylvania against the trustees alleging mismanagement, praying that the trustees be removed and repay losses to the estate. The trustees presented a petition in the state court resulting in an order enjoining the petitioners from prosecuting their suit in the U.S. District Court. On the same date, the District Court rendered an opinion holding it would continue to exercise jurisdiction. The state decision was upheld by the Supreme Court of Pennsylvania, whereupon the United States Supreme Court was confronted with a situation where each of the courts claiming jurisdiction had restrained the parties before it from proceeding in the other.

The court after reviewing the problem held:

"...it is settled that where the judgment sought is strictly in personam both the state court and the federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, *if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other.* We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where

courts are brought to marshall assets, administer trusts, or liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, the court must control the property." (305 U.S. 280) (emphasis supplied)

The Court in Lida, supra, further looking to the purpose of the federal suit, found that no question was presented in the federal court as to the right of the person to participate in their res or as to the quantum of his interest in it but the contentions are solely as to the *administration and restoration of the corupus of the trust.* The court accordingly concluded:

"The Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held quasi in rem, and the jurisdiction acquired upon the filing of the trustee's account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit...."

Another similar case is that of *Hutchins v. Pacific Mutual Life Insurance Company,* 20 F. Supp. 150 (S.D. Cal. 1937) affirmed 97 F. 2d 58 (9th Cir. 1938). In that case prior to any suit being filed in federal court, the state court vested title of all the assets of an insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. Subsequently, pursuant to petition of the Insurance Commissioner, the court approved liquidation of the insolvent company on the grounds that conservation was futile. The Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan after approval by the state was fully executed.

Thereafter, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire state proceeding was fraudulent and therefore, the state court lacked jurisdiction. The District Court in dismissing the federal action stated:

"This action, and the one in the state courts are actions in rem, or, at least, quasi in rem. *The relief sought is primarily concerned with the assets in question.* The rule in such cases in that *the Court first acquiring jurisdiction of the res has exclusive jurisdiction."* (20 F. Supp. 152) (emphasis supplied)

Donovan v. City of Dallas, 377 U.S. 408 (1964) does not change the rules set forth in *Princess Lida* and *Hutchins,* supra, but rather it recognizes:

"An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed."

General Atomic Company v. Felter, 434 U.S. , 98 S. Ct. 76 (1977) relied on heavily by Moody did not deal with an *in rem* or *quasi in rem* situation. Rather, that case reversed the New Mexico Supreme Court in that the New Mexico court had concluded that *Donovan,* supra:

"...precluded state courts only from enjoining litigants from proceeding further with federal suits in which jurisdiction has already attached at the time of the issuance of the injunction but permits state court injunctions against additional suits in federal courts."

II. THRUST OF PROPOSED MOODY ACTION IS WITHIN EXCEPTION TO EXERCISE OF CONCURRENT JURISDICTION.

Moody claims that the Alabama Supreme Court has ruled that state courts do have power to restrain the institution in the federal court of what plainly is an *in personam* anti-trust suit. This simply is not true. The Supreme Court of Alabama in its decision (351 So. 2d 554-555) reviewed Moody's proposed complaint to determine the relief actually sought by Moody. It found that considering the proposed complaint and the parties sought to be impleaded as defendants, there is no question the action inextricably involves the Empire receivership. Viewed as a whole, the picture is clear that the proposed action was nothing more than another ploy of Moody's to interfere with, delay and eventually stop the Empire receivership proceeding.

The thrust of anti-trust litigation is as stated in Section 4, of Title 15, USCA, to enjoin the violation and looks toward restraint and prohibition as the orders contemplated. Section 15 of Title 15, supra, permits suit by the individual injured to recover damages sustained. In the instant case, however, Moody seeks not merely monetary damages for an injury complained of but necessarily, revaluation of the principal asset of the Empire estate, that is, that trust placed in Empire, by Moody, and subsequently devalued by the receivership court and ancillary receivership courts.

It must be remembered that Empire went into receivership on June 29, 1972 in the State of Alabama. Preceding that order was an order of the ancillary receivership court of Arkansas, and subsequently Empire was placed in receivership in the states of Texas and Montana. All states acted under a devaluation of the principal asset of Empire, i.e. the Libbie Shearn Moody Trust. The principal receivership case in Alabama has been upheld in *Moody v. State, ex rel Payne,* Ala., 344 So.

2d 160 (1977) cert. denied, U.S. (Case No. 77428), and in Texas, *Moody v. Texas,* 538 S.W. 2d 158, (Tex. civ. app. - Waco 1976, n.r.e. 1977)

In paragraph four of Moody's proposed complaint, he names all of the former insurance commissioners of Alabama, Arkansas and Texas, being very careful to leave out the insurance commissioner of the State of Montana. Obviously, because this commissioner, who is also an ancillary receiver of Empire, has not left office. In paragraph five of Moody's complaint, he sets forth the principal thrust of his proposed law suit, that is, the devaluation of the principal asset of Empire, i.e. the life estate interest in the Libbie Shearn Moody Trust.

It is apparent, therefore, that unless res judicata apply, Moody's proposed suit of necessity must relitigate the valuation of the Empire interest in the Libbie Shearn Moody Trust, a valuation which has been placed on that trust by the courts of four states and numerous insurance commissioners past and present.

This being the principal thrust of the lawsuit, the receiver of Empire would of necessity have to defend the action, further depleting the assets of the receivership estate. If Moody were successful in his "antitrust" suit, we would be faced with two conflicting judicial valuations of the principal asset of the estate and in effect, conflicting judicial decisions as to whether or not Empire should in fact be in receivership.

CONCLUSION

By stating the issue presented for review in terms of broad state and federal constitutional guarantees and totally ignoring his track record of contemptuous abuse of civil process, Moody seeks to have this Court lift the restrictions of a valid and necessary injunction designed to protect the assets of Empire.

Moody has in virtually every court open to him, attempted to relitigate the original receivership proceeding. This attempt has been carried on since June of 1972 and has effectively prevented the final closing of the estate and distribution of the assets to the policyholders and other creditors. Moody has proven that for those wealthy enough to afford it, the process of state regulation can be ground to an effective halt.

While terming his proposed action as one "plainly" *in personam*, the facts show the real purpose to be that of relitigating the value of the principal asset of the estate of the Empire receivership, a matter which has been litigated not once but many times over.

The administration of the estate of a receivership is clearly an *in rem* or *quasi in rem* action and interference with the control over that estate cannot and should not be tolerated. The court having possession of the rest of the estate must be permitted to uphold it's dignity and orders by prohibiting unwarranted interference and relitigation of the valuation of that estate. Such interference is not purely *in personam* but is *quasi in rem* and falls within the exception to concurrent jurisdiction as noted by this Court in *Princess Lida* and *Donovan*. For these reasons the petition should be denied.

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

Proof of Service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by Counsel was filed by James W. Webb, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court of the same date the Brief in Opposition was filed.